Supreme Court, U.S.
FILED
JUN 12 1995
OFFICE OF THE CLERK

(14)

No. 94-1340

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CITIZENS BANK OF MARYLAND,

Petitioner,

v.

DAVID STRUMPF,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

Of Counsel:

BRIAN R. SEEBER
GINS & SEEBER, P.C.
2021 L Street, N.W.
Suite 200
Washington, D.C. 20036
(202) 785-9123

GREGORY P. JOHNSON
206 North Adams Street
Rockville, Maryland 20850
(301) 762-1400

MARK E. WOLFE
1680 Langley Drive
Hagerstown, Maryland 21740
(301) 745-3682

JOHN R. OWEN, JR.
(Counsel of Record)
JOHN R. OWEN, JR. AND
ASSOCIATES
1835 University Boulevard
Suite 232
Hyattsville, Maryland 20783
(301) 445-2100

ROGER SCHLOSSBERG
SCHLOSSBERG & ASSOCIATES, P.A.
134 West Washington Street
Hagerstown, Maryland 21740
(301) 739-8610

Attorneys for Respondent.

Washington, D.C. • WHEL PRESS • (202) 289-2260

BEST AVAILABLE COPY

3899

QUESTION PRESENTED

Whether a bank creditor may refuse a Chapter 13 debtor depositor's request to withdraw funds pending determination by the bankruptcy court of the bank's setoff right, without violating the automatic stay under 11 U.S.C. §362(a), especially when the Debtor's Chapter 13 Plan, which treated the bank creditor as an unsecured creditor, has been confirmed after notice without objection by the bank creditor.

Page

TABLE OF CONTENTS

QUESTION PRESENTED. i

TABLE OF AUTHORITIES iii

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT. 5

ARGUMENT 7

I. The Confirmation of the Debtor's Plan Fixed The Rights of Citizens and the Treatment to Which Its Claim Was Entitled. 7

A. Citizens' Failure to Object to the Confirmation of Debtor's Chapter 13 Plan Was a Waiver of Citizens' Right to Object to Its Treatment Therein and Bound It to the Provisions Thereof 7

B. Citizens Was Not a Secured Creditor 8

II. Citizens' Action in Unilaterally Freezing the Debtor's Bank Account Was Unlawful and Violated 11 U.S.C. §362(a) 10

A. Citizens Failed to Participate in the Chapter 13 Proceeding; Became Bound by the Provisions of the Confirmed Plan; and Then Ignored the Confirmation Order and the Bankruptcy Code 10

B. Citizens Violated Three Section of 11 U.S.C. §362(a). 12

1. The Violation of §362(a)(7) 12

2. The Violation of §362(a)(3) 12

3. The Violation of §362(a)(6) 14

C. The Violation of the Stay By Citizens Was Compounded by the Freezing by Citizens of More of the Debtor's Funds Than Required to Protect Its Claim 16

Page

III. Section 542(b) of the Bankruptcy Code Provides No Support For The Assertion by Citizens of Its Purported Right of Setoff Against the Debtor's Bank Account. 17

IV. The Unique Interests of the United States As Well As Those of State Taxing Authorities Do Not Support Reversal of the Decision of the Fourth Circuit Court of Appeals. 20

V. The Decision of the Fourth Circuit Court of Appeals Below Threatens No Constitutionally Protected Due Process Rights Of the Petitioner or Similarly Situated Creditors 22

CONCLUSION 24

APPENDIX:

– United States Constitution, Amendment V. 1a

– 11 U.S.C. §362 (1988). 1a

– 11 U.S.C. §363 (1988). 3a

– 11 U.S.C. §506 (1988). 4a

– 11 U.S.C. §541 (1988). 5a

– 11 U.S.C. §542 (1988). 5a

– 11 U.S.C. §1304 (1988) 6a

– 11 U.S.C. §1322 (1988) 6a

– 11 U.S.C. §1327 (1988) 6a

– Rule 25, Local Rules of the United States Bankruptcy Court for the District of Maryland 7a

TABLE OF AUTHORITIES

Cases:

Barnhill v. Johnson, 503 U.S. 393 (1992). 13

In re Blanton, 105 B.R. 321, 336-38 (Bkrtcy.E.D. Va. 1989) 9

Cases, continued: Page

Citizens Bank of Maryland v. Strumpf, 138 B.R. 792, 794 (D. Md. 1992), *rev'd.*, 37 F.3d 155 (4th Cir. 1994) 4

Citizens Bank of Maryland v. Strumpf, 37 F.3d 155, 159 (4th Cir. 1994) 4

Cumberland Glass Mfg. Co. v. DeWitt, 237 U.S. 447, 455 (1915). 9

Cusanno v. Fidelity Bank, 29 B.R. at 813. 18

In re Figgers, 121 B.R. 722, 778 (Bkrtcy. S.D. Ohio 1990) 14

In re Patterson, 967 F.2d 505 (11th Cir. 1992). . . . . *passim*

In re Rio, 55 B.R. 814 (Bkrtcy. M.D.Ala. 1985) 19

United States v. Norton, 717 F.2d 767, 773 (3rd Cir. 1983) 12, 14, 21

United States v. Reynolds, 764 F.2d 1004, 1007 (4th Cir. 1985) 12, 21

United States v. Whiting Pools, Inc., 462 U.S. 198 (1983). 15, 21

In re Wicks, 176 B.R. 695 (Bkrtcy. E.D.N.Y. 1995). 19

In re Wildcat Constr. Co., Inc., 57 B.R. 981 (Bankr.D.Vt. 1986) 13, 18

Constitutional Provisions:

U.S. Const. amend. V. 22

Statutes:

11 U.S.C. §362 (1988). . . . . *passim*

11 U.S.C. §362(a)(3) (1988). 5, 12, 13

11 U.S.C. §362(a)(6) (1988). 5, 14, 16

11 U.S.C. §362(a)(7) (1988). 5, 12, 23

Statutes, continued: Page

11 U.S.C. §362(f) (1988). 23

11 U.S.C. §363(c)(1) (1988). 19

11 U.S.C. §363(c)(2) (1988). 18, 19

11 U.S.C. §506(a) (1988). 8, 9, 10

11 U.S.C. §541 (1988). 13

11 U.S.C. §541(a)(1) (1988). 13

11 U.S.C. §542(b) (1988). 5, 17, 18

11 U.S.C. §553 (1988). 9, 17

11 U.S.C. §553(a) (1988). 18

11 U.S.C. §1304 (1988). 19

11 U.S.C. §1322(b)(2) (1988). 15

11 U.S.C. §1327(a) (1988). 8, 10

Miscellaneous:

Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353 13

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 340 (1977), *reprinted in*, 1978 U.S.C.C.A.N. 5787 . . . . . 11, 15

Local Rules of the U.S. Bankruptcy Court for the District of Maryland. 21, 22

Randy J. Shaw, *Finally, An Answer to the Banker's Dilemma!*, 68 Fla. B.J. 79 (1994). 11

No. 94-1340

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CITIZENS BANK OF MARYLAND,

Petitioner,

v.

DAVID STRUMPF,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

The relevant provisions of the United States Constitution, the United States Bankruptcy Code and the Local Rules of the United States Bankruptcy Court for the District of Maryland are reprinted in the appendix to this brief.

STATEMENT OF THE CASE

On January 25, 1991, the Respondent David Strumpf (the "Debtor") filed in the United States Bankruptcy Court for the District of Maryland his voluntary petition for relief under Chapter 13 of the United States Bankruptcy Code.[1] Filed together with his voluntary petition was the Debtor's Chapter 13 Statement and Statement of Affairs (R. 1) (Chapter 13 Statement, Statement of Affairs)[2] as well as the Debtor's proposed Chapter 13 Plan. (J.A. 3a); (R. 1). In the Chapter 13 Statement in response to Question 12(c), the Debtor included among his unsecured debts an indebtedness owed to the Petitioner Citizens Bank of Maryland (hereinafter the "Petitioner" or "Citizens") in the amount of $2,500.00. (R. 1) (Chapter 13 Statement).

On or about February 26, 1991, the bankruptcy court issued its Order for Meeting of Creditors, Combined With Notice Thereof and of Automatic Stays (the "First Meeting Notice") and forwarded the same to all parties-in-interest, including Citizens, (J.A. 7a) together with a copy of the Debtor's proposed Chapter 13 Plan which provided for the treatment of claims of unsecured creditors in Class III thereof. (J.A. 3a). Included among the

---

[1] 11 U.S.C. §§101 *et seq.* (1988) (hereinafter sometimes referred to as the "Bankruptcy Code" or the "Code").

[2] Consistent with the treatment of the certified record in the Petitioner's Brief, Respondent notes that the pages of the certified record are not consecutively paginated, and citations to the Record herein are to the Docket Entry in the Record, followed by a parenthetical description of the specific document within the Docket Entry to which citation is made. For example, in this citation, the Chapter 13 Statement and Statement of Affairs may be found at Docket Entry No. 1 of the certified Record; which Docket Entry is the entire Bankruptcy Court record as submitted to the District Court.

important information set forth in the First Meeting Notice was the date and time of the hearing on confirmation of the Debtor's Chapter 13 Plan, which was set for March 20, 1991, at 2:00 p.m. Also included in the First Meeting Notice was a cautionary note that any objections to confirmation of the Plan would be heard at the confirmation hearing. (J.A. 7a).

On March 20, 1991, following due notice thereof, the hearing on confirmation of the Debtor's Chapter 13 Plan was held and the Debtor's Chapter 13 Plan was confirmed; the Order Confirming Plan was thereafter entered on the docket on April 8, 1991. (J.A. 10a-11a).

On June 13, 1991, Citizens filed its Proof of Claim asserting an indebtedness owed to it in the amount of $2,555.50. Other than the filing of its Proof of Claim as aforesaid, Citizens did not avail itself of its right to participate in any way in the Chapter 13 bankruptcy proceeding until October 7, 1991.

On October 2, 1991, Citizens "froze" $3,500.00 maintained by the Debtor in a checking account at Citizens. (J.A. 26a). Five days later, on October 7, 1991, Citizens filed in the bankruptcy court its Motion for Relief from Automatic Stay and for Setoff reciting the existence of a debt owed to it by the Debtor in the aggregate amount of $3,259.68, inclusive of attorney's fees and interest accrued through October 15, 1991—eight days after the date of filing of the Motion. (J.A. 15a-16a).

On October 9, 1991, the Debtor filed his Motion to Hold Citizens in Contempt. (J.A. 23a-25a). In due course, Citizens' Motion for Relief from Stay was heard by the bankruptcy court on November 4, 1991, and ruling was reserved pending the filing of memoranda by

counsel. (R. 1) (Transcript, Nov. 4, 1991 hearing). Shortly thereafter, on November 13, 1991, the bankruptcy court considered the Debtor's Motion to Hold Citizens in Contempt. The bankruptcy court (Paul Mannes, Chief Judge) granted the Debtor's Motion holding Citizens in contempt for violation of the automatic stay and awarded nominal damages of $25.00 to the Debtor together with punitive damages of $375.00 and attorney's fees to Debtor's counsel in the amount of $500.00. (J.A. 27a-28a). Shortly thereafter, following release of the freeze on the Debtor's bank account by Citizens, the bankruptcy court (Paul Mannes, Chief Judge) granted the Motion of Citizens for relief from the stay. (J.A. 29a).

Citizens subsequently appealed the decision of the bankruptcy court granting the Debtor's Motion for Contempt to the United States District Court for the District of Maryland. (R. 1) (Notice of Appeal). On March 30, 1992, the district court (Hargrove, District Judge) reversed the decision of the bankruptcy court by its Memorandum Opinion and Order. (J.A. 31a-38a); *Citizens Bank of Maryland v. Strumpf*, 138 B.R. 792 (D. Md. 1992), *rev'd.*, 37 F.3d 155 (4th Cir. 1994).

The Debtor thereafter appealed the decision of the District Court to the United States Court of Appeals for the Fourth Circuit. On October 13, 1994, the court of appeals reversed the ruling of the district court and remanded the case with instructions to reinstate the decision of the bankruptcy court. (J.A. 39a-46a); *Citizens Bank of Maryland v. Strumpf*, 37 F.3d 155 (4th Cir. 1994). On October 27, 1994, Citizens filed a Petition for Rehearing or, in the Alternative, Suggestion for Rehearing *En Banc* with the Fourth Circuit. On November 8, 1994, that Petition was denied.

On February 6, 1995, Citizens filed herein its Petition for Writ of Certiorari, which Petition was granted by this Court on March 27, 1995.

SUMMARY OF THE ARGUMENT

Debtor filed a Chapter 13 Petition and Chapter 13 Statement listing the unsecured claim of Petitioner Citizens. A Chapter 13 Plan was filed providing for distributions to all unsecured creditors including Petitioner. All creditors were notified of the hearing on confirmation of that Plan and of their opportunity to object. When Citizens failed to object to confirmation and the Chapter 13 Plan was confirmed, Citizens became bound thereby.

Following that confirmation hearing, Citizens took no action to seek a modification of the confirmed Chapter 13 Plan. Some eight (8) months following the filing of the Debtor's voluntary petition under Chapter 13 of the Bankruptcy Code, and some six (6) months following confirmation of the Debtor's Chapter 13 Plan, Citizens unilaterally and without prior notice froze the bank account of the Debtor maintained with Citizens without benefit of any application to or order of the bankruptcy court. Further, Citizens froze funds in the Debtor's bank account in an amount some several hundred dollars in excess of that which Citizens claimed to be owed by the Debtor. By virtue of Citizens' action in freezing the Debtor's bank account, Citizens violated the provisions of 11 U.S.C. §§362(a)(7), (a)(3) and (a)(6).

Notwithstanding Citizens' assertion that its actions in freezing the Debtor's bank account are expressly countenanced by §542(b) of the Bankruptcy Code, careful analysis of that section reveals that the same is simply inapplicable without a prior request to and order from

the bankruptcy court modifying the automatic stays imposed by 11 U.S.C. §362 to permit such a freezing and setoff of the Debtor's bank account.

Further, the assertion by the Petitioner that the imposition of prior relief limitations on its setoff rights is an unconstitutional taking of its property without due process of law in violation of the Fifth Amendment to the United States Constitution is similarly without merit. Throughout the Bankruptcy Code, a careful balance is maintained between the rights of debtors and creditors which sometimes results in the conditioning and/or delay of enforcement of creditors' rights in favor of the Bankruptcy Code's goal of an orderly restructuring of debtor/creditor relationships. As that goal is advanced by the limited restrictions placed upon creditors with rights of setoff without a deprivation of those creditors' rights, there can be no serious argument that those restrictions are an unconstitutional taking of property without due process of law.

Finally, the Respondent states that the *amicus curiae* brief of the United States advances a strained interpretation of the Bankruptcy Code which would eviscerate the debtor protection provisions manifest in 11 U.S.C. §362. Rather than adopt that view, Respondent urges that the statutory scheme can best be preserved and respected through the careful implementation of general or local rules of bankruptcy procedure similar to that adopted by the United States Bankruptcy Court for the District of Maryland and providing an orderly mechanism within the Bankruptcy Code for the processing and setoff of debtors' tax refunds and overpayments.

ARGUMENT

I.

THE CONFIRMATION OF THE DEBTOR'S PLAN FIXED THE RIGHTS OF CITIZENS AND THE TREATMENT TO WHICH ITS CLAIM WAS ENTITLED.

A. Citizens' Failure to Object to the Confirmation of Debtor's Chapter 13 Plan Was a Waiver of Citizens' Right to Object to Its Treatment Therein and Bound It to the Provisions Thereof.

As noted in the Statement of the Case, *supra*, the Debtor's Chapter 13 Plan was filed herein on January 25, 1991, together with the Debtor's Voluntary Petition under Chapter 13 of the Bankruptcy Code. The Debtor filed his Chapter 13 Statement on that date, which included the claim of Citizens in the amount of $2,500.00 as an unsecured claim. On February 26, 1991, the bankruptcy court issued the First Meeting Notice and forwarded the same to all parties in interest, including Citizens, together with a copy of the Debtor's Chapter 13 Plan. Contrary to the assertion of the Petitioner in its brief, the Plan made full provision for the treatment of Citizens' claim together with the claims of all other unsecured creditors in Class 3 thereof (J.A. 3a). The First Meeting Notice further noted that a hearing on confirmation of the Plan would be held on March 20, 1991, at 2:00 p.m., and cautioned as follows:

> IF WRITTEN OBJECTIONS TO CONFIRMATION ARE FILED, A HEARING ON SUCH OBJECTIONS WILL BE HELD AT THE TIME OF THE CONFIRMATION HEARING.

(emphasis in original) (J.A. 7a).

Notwithstanding the treatment of Citizens' claim in the Chapter 13 Plan as unsecured and the bold warning

to all creditors contained in the First Meeting Notice that objections to the Chapter 13 Plan would be considered at the confirmation hearing on March 20, 1991, Citizens took no action and interposed no objection to the treatment provided for it under the Chapter 13 Plan. Accordingly, the Chapter 13 Plan came on for confirmation at the scheduled hearing and was confirmed by order of the bankruptcy court entered on April 8, 1991 (J.A. 10a-11a).

With the entry of the Order Confirming Plan, Citizens was bound to the treatment of its claim contained in the Chapter 13 Plan, pursuant to the provisions of 11 U.S.C. §1327(a). Even following the entry of that Order, Citizens took no action in the Chapter 13 case to assert any claim for different treatment than that proposed for it by the Debtor in his Chapter 13 Plan. While Citizens filed its Proof of Claim in the Chapter 13 proceeding on June 13, 1991, asserting a secured claim in the amount of $2,555.50, it took no action in the bankruptcy court to seek a revision of the Chapter 13 Plan to provide treatment thereunder as a secured creditor. Indeed, other than the filing of its Proof of Claim as aforesaid, Citizens took no action for the first eight (8) months of the Chapter 13 proceedings to assert its right to treatment under the Chapter 13 Plan other than as proposed by the Debtor.

B. Citizens Was Not a Secured Creditor.

Although Citizens asserts that it was a secured creditor in the Chapter 13 proceedings by virtue of its alleged setoff rights and the provisions of 11 U.S.C. §506(a) of the Bankruptcy Code, careful reading of that section makes clear that such secured status does not automatically arise upon the assertion of a right of setoff, but only upon a

determination by the bankruptcy court that a setoff will be permitted in a given case.

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. §506(a) (1988).

Indeed, the above-quoted language makes clear the intention of the drafters of the Bankruptcy Code that any party desiring treatment as a secured creditor by virtue of an asserted (but disputed) right of setoff must participate in the hearing on confirmation of the Debtor's Chapter 13 Plan or in some other hearing regarding setoff, or use of funds subject to setoff. The participation of such creditor is required, *inter alia*, because a creditor's right of setoff is permissive in nature, rather than mandatory, and the exercise of setoff is within the discretion of the bankruptcy court under general principles of equity. *Cumberland Glass Mfg. Co. v. DeWitt*, 237 U.S. 447, 455 (1915); *See also In re Blanton*, 105 B.R. 321, 336-38 (Bkrtcy.E.D.Va. 1989) (collecting cases reviewing allowance and disallowance of setoff). Only through a full airing of the creditor's claimed right of setoff at the confirmation hearing, or at some other hearing prior thereto,

can the bankruptcy court consider the equities of the asserted right of setoff, for the purpose of allowing or disallowing a requested setoff, and to determine any secured status pursuant to §506(a). As Citizens did not seek a determination of its alleged secured status at or prior to the confirmation hearing on the Debtor's Chapter 13 Plan, the confirmed Plan represents a judicial determination of Citizens' rights on proper notice to Citizens and to every other creditor. Citizens was bound to the treatment provided in the confirmed Plan, which treatment is as an unsecured creditor. 11 U.S.C. §1327 (a) (1988).

II.

CITIZENS' ACTION IN UNILATERALLY FREEZING THE DEBTOR'S BANK ACCOUNT WAS UNLAWFUL AND VIOLATED 11 U.S.C. §362(a).

A. Citizens Failed to Participate in the Chapter 13 Proceeding; Became Bound by the Provisions of the Confirmed Chapter 13 Plan; and Then Ignored the Confirmation Order and the Bankruptcy Code.

After Citizens' inaction at and prior to confirmation of the Chapter 13 Plan resulted in a determination of its treatment under the Plan, Citizens took no appropriate action to cure what it came to believe was inadequate treatment. While Citizens could have filed an appropriate pleading seeking modification of the Debtor's Chapter 13 Plan to provide treatment for Citizens as a creditor allegedly secured by setoff rights in the Debtor's bank account, or could have filed a Motion seeking relief from the various stays imposed by §362 to permit it to assert and exercise its rights of setoff against the Debtor's bank account, Citizens elected neither of said options. Further, no other judicial remedy was pursued. Instead, Citizens

chose to ignore both the court order confirming the Plan as well as the carefully orchestrated scheme of debt restructuring contemplated throughout the Bankruptcy Code. Citizens unilaterally, and without any recourse to the statutory scheme of the Bankruptcy Code or to judicial determination, setoff the Debtor's bank account in the amount of $3,500.00 as a result of a pre-petition unsecured debt which was no more than $3,259.68.

Indeed, the actions of Citizens to protect its narrow interests some eight (8) months into the subject bankruptcy case in absolute disregard of the rights of all other creditors illumines the wisdom of Congress in its inclusion in the Bankruptcy Code of the automatic stay provisions of 11 U.S.C. §362.[3] Commenting on the purpose of that bedrock provision, the House Committee on the Judiciary noted as follows:

> The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the[ir] claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 340 (1977), *reprinted in*, 1978 U.S.C.C.A.N. 5787.

---

[3] The purpose of the automatic stay, in essence, is to prevent the further desiccation of the debtor's cash flow through the loss of bank accounts and accounts receivable thereby expediting the financial recovery of the debtor. Randy J. Shaw, *Finally, An Answer to the Banker's Dilemma!*, 68 Fla. B.J. 79 (1994).

All creditors, including Citizens, were bound by law to the treatment provided in the confirmed Plan. Citizens acted in derogation of that legal duty, in its own parochial interest, and to the complete disregard of all other parties in interest.

B. Citizens Violated Three Sections of 11 U.S.C. §362(a).

1. The Violation of §362(a)(7).

The Fourth Circuit relied on opinions of numerous other courts of appeals written since the adoption of the Bankruptcy Reform Act of 1979 to support the conclusion that the imposition of an administrative freeze on a debtor's bank accounts is tantamount to a setoff under 11 U.S.C. §362(a)(7). Those opinions firmly establish the principle in those several circuits that the denial to debtors of meaningful and timely access to deposit accounts maintained in the name of those debtors is an exercise of control over property of the debtor's estate in violation of 11 U.S.C. §362(a)(3) as well as a premature attempted setoff of property of the debtor's estate in violation of 11 U.S.C. §362(a)(7). *See In re Patterson*, 967 F.2d 505, 513 (11 Cir. 1992); *United States v. Reynolds*, 764 F.2d 1004, 1007 (4th Cir. 1985); *United States v. Norton*, 717 F.2d 767, 773 (3rd Cir. 1983).

2. The Violation of §362(a)(3).

Although not embraced by the court of appeals, the bankruptcy court below found that Citizens' action in freezing the Debtor's bank account violated the automatic stay's prohibition contained in 11 U.S.C. §362(a)(3). (R. 1) (Transcript, Nov. 4, 1991 hearing). In opinions

of other courts echoing that determination by the bankruptcy court below, those courts have noted the expression of Congressional intent in expanding the ambit of §362(a)(3) by the amendment of that section included in the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353. While §362(a)(3) previously proscribed ". . . any act to obtain possession of property of the estate or of property from the estate . . . ," the 1984 amendments substantially strengthened that section by including therein a prohibition against acts ". . . to exercise control over property of the estate. . . ." 11 U.S.C. §362(a)(3) (1988); *See In re Wildcat Constr. Co., Inc.*, 57 B.R. 981 (Bankr.D.Vt. 1986).

Although Citizens properly observes in its brief that the funds in the Debtor's bank acount were not, in and of themselves, property of the estate, *Barnhill v. Johnson*, 503 U.S. 393 (1992), the right to withdraw those funds is property properly included within the pervasive definition of "property of the estate." 11 U.S.C. §541 (1988). That section includes in the definition of "property of the estate" "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. §541(a)(1) (1988). The Debtor's right to withdraw funds is at least an equitable right, and as such is included within the property of the Debtor's estate. As such, the unilateral imposition by Citizens of an administrative freeze on the Debtor's bank account was an act which impeded the Debtor's access to his funds and therefore represented the exercise by Citizens of ". . . control over property of the estate. . . ." 11 U.S.C. §362(a)(3) (1988).

3. The Violation of §362(a)(6).

The provisions of 11 U.S.C. §362(a)(6) prohibit "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title. . . ." That section is succinct and not difficult to understand, notwithstanding the obfuscatory efforts of the Petitioner to the contrary. There is no doubt that Citizens' action was in respect of "a claim against the debtor that arose before the commencement of the case. . . ." 11 U.S.C. §362(a)(6) (1988). Similarly, there can be no serious dispute that the act of freezing the Debtor's bank account was designed to collect or recover that claim. *In re Patterson*, 967 F.2d 505, 512 (11th Cir. 1992); *In re Figgers*, 121 B.R. 772, 778 (Bkrtcy. S.D. Ohio 1990). Thus, the violation of §362-(a)(6) is clear and compelling.

While Citizens may ultimately have been entitled to relief from stay had it requested such relief prior to the confirmation of the Debtor's Chapter 13 Plan, the simple fact remains that no relief from the stay was requested or granted, and the act of freezing the Debtor's bank account falls squarely within the proscription of §362(a)(6).

In *United States v. Norton*, 717 F.2d 767 (3rd Cir. 1983), the court elucidated many of the relevant points in this analysis. The Third Circuit cited the legislative history to remind creditors, and the courts which review their actions, as follows:

> The purpose of chapter 13 is to enable an individual, under court supervision and protection, to develop and perform under a plan for the repayment of his debts over an extended period. In some cases, the plan will call for full repayment. In others, it may offer creditors a percentage of their claims in full

> settlement. During the repayment period, creditors may not harass the debtor or seek to collect their debts. They must receive payments only under the plan. This protection relieves the debtor from indirect and direct pressures from creditors, and enables him to support himself and his dependents while repaying his creditors at the same time.

United States v. Norton, 717 F.2d 767, 773 (3rd Cir. 1983) (quoting H.Rep. 595, *supra* at 118).

The Court then observed that "even creditors whose claims are secured under the Code must submit to the risk inherent in judicial supervision of the rights they normally would have to enforce their claims against property of the debtor." *United States v. Norton*, 717 F.2d 767, 773-74 (3rd Cir. 1983) (citing *U.S. v. Whiting Pools, Inc.*, 462 U.S. 198 (1983)). The Third Circuit further notes that "[s]ection 1322 of the Code specifically authorizes a modification of the rights of most holders of secured claims and all holders of unsecured claims. 11 U.S.C. §1322(b)(2)." 717 F.2d pp. 773-74 at n. 10.

Thus, the complaint made by Citizens in its brief that affirmance by this Court of the decision of the Fourth Circuit will deprive Citizens of its setoff rights existing under state law ignores a central tenet of bankruptcy law—bankrupcy courts are empowered by the Bankruptcy Code to modify the rights of secured and unsecured creditors through the confirmation of a Plan. Such a modification of the rights of Citizens occurred when the Chapter 13 Plan was confirmed by the bankruptcy court below following Citizens' voluntary decision not to participate in the confirmation process. Unfortunately, Citizens' response to that modification of its rights by unilaterally and without prior notice freezing the Debtor's bank account some eight months after filing the

Chapter 13 Petition, and six (6) months after confirmation of the Chapter 13 Plan, violated the automatic stay imposed by §362(a)(6).

C. The Violation of the Stay By Citizens Was Compounded by the Freezing by Citizens of More of the Debtor's Funds Than Required to Protect Its Claim.

Adding insult to the injury inflicted by Citizens upon the Debtor is the fact, glossed over by both the bankruptcy court and the court of appeals below, that Citizens imposed a freeze on the Debtor's bank accounts well in excess of any amount which was then allegedly owed to it by the Debtor. As noted in the Statement of the Case, *supra*, the Debtor acknowledged in his Chapter 13 Statement a debt owed to Citizens in the amount of $2500.00. (R. 1) (Chapter 13 Statement). Indeed, in its Proof of Claim filed on June 13, 1991, Citizens itself asserted a claim of only $2,555.50. (R. 1) (Proof of Claim). Further, in its Motion for Relief from Stay filed five (5) days after its freeze of the Debtor's bank account, Citizens recited a debt owed to it in the total amount of only $3,259.68, inclusive of accrued interest and attorney's fees. (J.A. 15a-16a). Notwithstanding the express acknowledgement by Citizens that it was therefore owed not more than the $3,259.68 set forth in its Motion for Relief from Stay, Citizens had already frozen the sum of $3,500.00 five (5) days before the filing of that Motion—some several hundred dollars in excess of even its own most optimistic accounting of its claim.[4]

[4] Respondent notes that even that sum of $3,259.68 recited in Citizens' Motion for Relief from Stay included interest not yet accrued; the same having been accounted through October 15, 1991—eight (8) days after the filing of that Motion and thirteen (13) days after the freeze of the Debtor's bank account.

Surely such an action, when combined with the extraordinarily dilatory handling of Citizens' claim throughout the Debtor's then eight-month old bankruptcy case, belies any suggestion that Citizens acted in good faith and should be extended the benefits of an equitable view of its claim and alleged setoff rights in respect thereof.

III.

SECTION 542(b) OF THE BANKRUPTCY CODE PROVIDES NO SUPPORT FOR THE ASSERTION BY CITIZENS OF ITS PURPORTED RIGHT OF SETOFF AGAINST THE DEBTOR'S BANK ACCOUNT.

In its brief, the Petitioner asserts that it was expressly authorized by §542(d) to freeze administratively the Debtor's bank account pending prospective determination by the bankruptcy court of Citizens' motion seeking relief from §362(a)(7) to permit setoff of that bank account. It is true that under the plain language of §542 (b), Citizens may decline to turnover debts due by it to the Debtor to the extent Citizens has debts due it from the Debtor, but only to the extent permitted by 11 U.S.C. §553 of the Bankruptcy Code.

By its terms, §553 permits setoff only after compliance by an offsetting creditor with the provisions of §362 of the Bankruptcy Code.

> (a) Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the

> debtor that arose before the commencement of the case. . . .

11 U.S.C. §553(a) (1988).

In a cogent analysis of the assertion that §542(b) authorizes a freeze of debtors' bank accounts in situations such as are presented in the instant case, the court in *In re Wildcat Constr. Co., Inc.*, 57 B.R. 981 (Bankr. D.Vt. 1986) observed:

> Indeed, perhaps the most fundamental problem with countenancing the freezing of the debtor's bank accounts before any judicial determination of the rights of the parties has been made is that it begs the critical question, assuming in advance the precondition for its validity. This position converts a bank's potential right to setoff into an allowed claim at the outset. These Courts "seem to assume that the bank has the right to make the initial determination of which bank accounts are cash collateral which the debtor may not use. . . ." *Cusanno v. Fidelity Bank*, 29 B.R. at 813. The freeze is essentially an extra-judicial temporary restraining order. We must not delegate to one of the parties the judicial responsibility of deciding whether the funds in the accounts are cash collateral and of enforcing the statutory prohibition against using such cash collateral.

In re Wildcat Constr. Co., Inc., 57 B.R. at 986.[5]

---

[5] While the Petitioner spills copious appellate ink in its Brief espousing its assertion that the Respondent was somehow in violation throughout the Chapter 13 case of the proscriptive cash collateral provisions of 11 U.S.C. §363(c)(2), Respondent observes that the instant case is presented to this Court not upon any complaint regarding such alleged unauthorized use of cash collateral, but rather upon the finding by the bankruptcy court and the court

[footnote continued]

Nothing in the instant case prohibited Citizens at any time during the entire eight-month history of the subject Chapter 13 proceedings from seeking authority from the bankruptcy court to setoff the Debtor's bank account. Although Citizens asserts that any filing of a request for relief from the §362 stay would necessarily have alerted the Debtor to Citizens' intentions (and presumably would have triggered a withdrawal of funds from the account by the Debtor), Congress contemplated such a "banker's dilemma" when it enacted 11 U.S.C. §362(f) of the Bankruptcy Code permitting the granting of *ex parte* relief from the stay as required to prevent irreparable damage to creditors such as Citizens. As observed by the Court of Appeals for the Eleventh Circuit in *In re Patterson*, 967 F.2d 505 (11th Cir. 1992):

> Creditors in this position have an alternative remedy and need not freeze debtors' accounts. The creditor may file an ex parte motion pursuant to Sections 362(f) or 363(e) and accompany this motion with the funds from the debtor's account to be paid into the registry of the bankruptcy court. This approach strikes the proper balance between the parties' interests. The creditor is protected from the risk that funds will be insufficient or unavailable to satisfy a later-determined valid right of setoff. The debtor is protected from the risk that a creditor will unilaterally deny the debtor access to funds in

---

of appeals that Citizens acted in violation of the fundamental debtor protections afforded by 11 U.S.C. §362. In any event, Respondent notes that the provisions of 11 U.S.C. §363(c)(2) are manifestly inapplicable to a retired individual, such as the Respondent, who is not "engaged in business." See 11 U.S.C. §363(c)(1); 11 U.S.C. §1304. See also, *In re Rio*, 55 B.R. 814, 817 (Bk. Ct. M.D. Ala. 1985) and *In re Wicks*, 176 B.R. 695, 698-99 (Bk. Ct. E.D. N.Y. 1995).

which the creditor does not have a valid right of setoff.

In re Patterson, 967 F.2d at 511.

Unfortunately, the only "banker's dilemma" apparently considered by Citizens herein was whether to expend that effort necessary to avail itself of the very protection inserted by Congress in the Bankruptcy Code to protect creditors in the position in which Citizens found itself. In the instant case, approval by this Court of the dilatory handling by Citizens of its claim and setoff rights against the Debtor would provide to all creditors with similar claims and purported setoff rights a road map for the disingenuous. If Citizens is to be permitted the right to allow the Debtor to propose and obtain confirmation, without objection from Citizens, of his Chapter 13 Plan providing treatment for Citizens as an unsecured creditor, and then blithely to ignore the confirmed Plan in favor of its own draconian implementation of its long-waived setoff rights, great violence will thereby be visited on the careful framework of the adjustment of debtor-creditor relationships contemplated by Congress in enacting Chapter 13 of the Bankruptcy Code.

IV.

THE UNIQUE INTERESTS OF THE UNITED STATES AS WELL AS THOSE OF STATE TAXING AUTHORITIES DO NOT SUPPORT REVERSAL OF THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS.

In its *amicus curiae* brief supporting the Petitioner herein, the United States notes its special interest in the issue at bar by virtue of the frequent position of the Government as a creditor seeking to setoff tax refunds and overpayments due to debtors from the Government

against other tax indebtedness owed by those debtors to the Government. (Brief of United States, pp. 1-2).

Implicit in the Government's expressed interest in these proceedings is its legitimate concern that a ruling favorable to the Debtor herein will necessarily thereafter require the Government to engage in widespread litigation in an overwhelming number of bankruptcy proceedings in order to secure for the Government the relief from the automatic stay imposed by 11 U.S.C. §362 necessary to permit it routinely to setoff debtors' tax refunds and overpayments against their pre-existing tax liabilities.

The short answer to the Government' dilemma is that it would be bound to seek prior relief from the automatic stay just as are bank and other non-government creditors, and courts have so held. *United States v. Reynolds*, 764 F.2d 1004, 1006-07 (4th Cir. 1985); *United States v. Norton*, 717 F.2d 767, 773-74 (3rd Cir. 1983) (citing *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983)). Such an abbreviated response need not be the final word with regard to the Government's unique position.

In the District of Maryland, from which this case originates, the bankruptcy court has taken express note of the unique situation of the United States and the State of Maryland by adoption of Local Rule 25 ("Internal Revenue Service and Maryland Income Tax Refunds–Automatic Stay"). That Rule, as set forth in its entirety in the Appendix to this brief, establishes a thoughtful mechanism addressing the legitimate concerns of the Government while not overburdening the bankruptcy court with motions for relief from stay in a large number of those cases filed in that court. The local rule makes

special provision regarding tax refunds to permit the Government and the State of Maryland

> . . . to offset against any refund or overpayment due a debtor, any taxes due to the United States or the State of Maryland, provided that a claim for such taxes has been filed and neither disputed nor disallowed in a federal or state court.

Rule 25(b)(1), Local Rules of the U.S. Bankruptcy Court for the District of Maryland.

In this fashion, the bankruptcy court pays heed to the proscriptive provisions of 11 U.S.C. §362 while providing a practical framework within which necessary setoffs can be made without a plethora of unnecessary litigation. It is respectfully submitted that any impact on the Government or other state taxing authorities as may result from an affirmance herein of the opinion of the Fourth Circuit below can best be addressed through the adoption of a local or general rule by the several bankruptcy courts or this Court similar to that now effective in Maryland.

V.

THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS BELOW THREATENS NO CONSTITUTIONALLY PROTECTED DUE PROCESS RIGHTS OF THE PETITIONER OR SIMILARLY SITUATED CREDITORS.

In its brief, Citizens asserts that the ruling of the Fourth Circuit below constitutes a complete usurpation of secured creditors' rights of setoff and, as such, is an unconstitutional taking of property without due process of law in violation of the Fifth Amendment to the United States Constitution. In fact, such a reading of the Fourth Circuit's opinion below is disingenuous, hyperbolic, and incendiary.

Nothing in the Fourth Circuit's opinion below suggests that secured creditors' rights of setoff are vitiated by operation of 11 U.S.C. §362(a)(7); rather, the decision of the Fourth Circuit properly notes that the right of setoff is not without limits and conditions when exercised in the context of a pending bankruptcy proceeding. Specifically, the Fourth Circuit notes that by utilizing the simple expedient of 11 U.S.C. §362(f), Citizens could have achieved complete protection of its right of setoff, while ensuring that no violence was done to the carefully constructed scheme of bankruptcy administration envisioned by the Bankruptcy Code.

In requiring that Citizens seek relief from the bankruptcy court pursuant to the provisions of 11 U.S.C. §362, the Fourth Circuit recognized that the exercise of the right of setoff by Citizens was not at all unlike the exercise by secured creditors of their rights to enforce mortages and deeds of trusts and other security interests in realty and personalty. In such circumstances, while the Bankruptcy Code conditions the rights of those creditors to enforce their security interests by first requiring application to and order from the bankruptcy court permitting the enforcement of their security interests, no security interest itself is lost nor is any right to the enforcement of that security interest. To the contrary, the only limiting factor placed upon those secured creditors is the necessary intervention of the bankruptcy court and the delay incident thereto. This is not an impermissible or unwarranted burden on creditors.

In imposing special conditions and limitations on the exercise of the rights of secured creditors as well as those seeking to exercise rights of setoff, the drafters of the Bankruptcy Code carefully balanced the competing interests of the vested property rights of those creditors

against the legitimate requirements of debtor protection and the goal of orderly restructuring of debtor-creditor relationships manifest throughout the Bankruptcy Code. Courts across the country have acknowledged Congress' express purpose in adopting the statutory scheme in this regard, as did the Fourth Circuit below.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

JOHN R. OWEN, JR.
(Counsel of Record)
ROGER SCHLOSSBERG
BRIAN R. SEEBER
GREGORY P. JOHNSON
MARK E. WOLFE
Attorneys for Respondent.

June 12, 1995

APPENDIX

RELEVANT CONSTITUTIONAL AND STATUTORY RULES AND PROVISIONS

UNITED STATES CONSTITUTION AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

---

11 U.S.C. §362 (1988)

§362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of –

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title,

or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

* * *

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

---

11 U.S.C. §363 (1988)

§363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act (15 U.S.C. 18a) in the case of a transaction under this subsection, then –

(A) notwithstanding subsection (a) of such section, such notification shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the tenth day after the date of the receipt of such notification, unless the court, after notice and hearing, orders otherwise.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1304, 1203 or 1204 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless –

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

---

11 U.S.C. §506 (1988)

§506. Determination of secured status.

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the

case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

---

11 U.S.C. §541 (1988)

§541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

---

11 U.S.C. §542 (1988)

§542. Turnover of property to the estate

(b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

---

11 U.S.C. §1304 (1988)

§1304. Debtor engaged in business

(a) A debtor that is self-employed and incurs trade credit in the production of income from such employment is engaged in business.

(b) Unless the court orders otherwise, a debtor engaged in business may operate the business of the debtor and, subject to any limitations on a trustee under sections 363(c) and 364 of this title and to such limitations or conditions as the court prescribes, shall have, exclusive of the trustee, the rights and powers of the trustee under such sections.

(c) A debtor engaged in business shall perform the duties of the trustee specified in section 704(8) of this title.

---

11 U.S.C. §1322 (1988)

§1322. Contents of plan

(b) Subject to subsections (a) and (c) of this section, the plan may –

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

---

11 U.S.C. §1327 (1988)

§1327. Effect of confirmation

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

LOCAL RULES OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MARYLAND

Rule 25. Internal Revenue Service And Maryland Income Tax Refunds – Automatic Stay

(a) Refunds. The Internal Revenue Service and the Maryland Comptroller of the Treasury, Income Tax Division, are authorized to make income tax refunds, in the ordinary course of business, directly to debtors in Chapter 7, 12, and 13 cases; provided, however, that in Chapter 7 cases no refund will be made to debtors within sixty (60) days after a petition is filed. Thereafter, unless otherwise directed by the trustee or the Court, a refund may be made directly to the debtor.

(b) Offset; Assessment; Automatic Stay.

(1) The Internal Revenue Service and the Maryland Comptroller of the Treasury, Income Tax Division, are authorized to offset against any refund or overpayment due a debtor any taxes due the United States or the State of Maryland, provided that a claim for such taxes

has been filed and neither disputed nor disallowed in a federal or state court.

(2) The Internal Revenue Service and the Maryland Comptroller of the Treasury, Income Tax Division, are authorized to assess any tax liability that may be satisfied by offsetting an overpayment when such liability has not previously been assessed. Notice of such assessment and offset shall be given to the debtor prior to or substantially concurrently with such assessment and offset.

(3) The Internal Revenue Service and the Maryland Comptroller of the Treasury, Income Tax Division, are authorized to assess, but take no other steps toward collection of, tax liabilities shown on voluntarily filed returns and other agreed-to tax liabilities unless otherwise authorized by this Rule, or by order of court. The exception to automatic stay in 11 U.S.C. §362(b)(9) shall be deemed automatically modified in accordance with the provision of this Rule.

(c) **Notice to Trustee and Court.** The debtor shall, within five (5) days of receipt of a tax refund or notice of tax assessment or deficiency, file with the Court and send to the trustee a copy of the refund check (in Chapter 7 cases) and transmittal letter, the tax assessment or deficiency notice, and other documents evidencing same.
